HOSNA REALTY SDN. BHD.

v.

NOR AZHAR BIN ZAINOL & ORS.

HIGH COURT MALAYA, ALOR SETAR
TUAN HAJI MOHD NOOR BIN HAJI ABDULLAH J.
[ORIGINATING SUMMONS NO. 24-273-93]
19 JULY 1994

LAND LAW: Order 89 RHC - Application for possession of land with house - Defendant entering into agreement to purchase property from plaintiff - 10% of purchase price paid - Failure to pay the balance despite notices of demand from plaintiff - Defendant going into possession - Whether possession lawful - Plaintiff terminating agreement and giving notice to defendant to vacate - Defendant refusing to vacate - Defendant denying receipt of notices of demand - Whether notices sufficiently served - Defendant claiming plaintiff's agents agreed to terms of payment set out in defendant's bank loan agreement - Terms in agreement and loan irreconcilable - Defendant disclaiming knowledge of variation of terms - Whether defendant had the duty to obtain a compromise on the terms - Whether there was a collateral oral agreement between the defendant and the plaintiff's agents to waive clauses 5 & 9 of the agreement - Whether O. 89 RHC applicable against the defendant - Whether execution of the agreement conferred equitable ownership on defendant - Whether plaintiff a bare or constructive trustee - Whether plaintiff was entitled to possession.

By an agreement dated 14 March 1991 the defendant purchased a piece of land together with a house to be erected thereon from the plaintiff. The Defendant paid 10% of the purchase price but thereafter failed to pay the balance sum despite repeated notices of demand from the plaintiff. On 21 April 1992, the defendant terminated the agreement with liberty to dispose of the property pursuant to the terms of the agreement. On or about 21 August 1992 the defendant broke into the house and occupied it without licence or consent of the plaintiff. The plaintiff lodged a police report and gave notice to the defendant to vacate the house but the defendant ignored the notice. The plaintiff filed an application under O. 89 of the Rules of the High Court 1980 (RHC) for possession of the property.

The defendant contended *inter alia* that the plaintiff's agents had agreed to the terms of payment set out in the defendant's bank loan agreement which was irreconciliable with the terms in the sale agreement. The defendant disclaimed any knowledge of the variation which he did not agree to and claimed that his occupation of the premises was in exercise of his right as purchaser and to prevent a fraud perpetrated against him. The defendant denied receiving all the notices of demand issued by the plaintiff, most of which were sent to his former address and further contended that even if there was a breach of the agreement the plaintiff had waived his right to terminate the agreement and was estopped from doing so.

Held:

[1] The defendant had by tortious means obtained possession of the land but the defendant cannot enter possession of the land in that manner. The defendant may however seek specific performance of the contract and obtain possession. The defendant has a right *in personam* against the plaintiff but not a right *in rem*.

[2] The various notices of demand were sent by AR registered post to the defendant's address mentioned in the agreement which constituted sufficient service of such notice.

[3] The defendant having obtained a 5 star plan housing loan from the bank failed to arrange with the bank to utilise the facility and remained inactive for over a year. The defendant was aware that the agreement provides that the schedule of payment was according to the architect's progress certificate but the loan provides that the disbursement of funds by the bank was against the certificate of fitness for occupation. The duty lay with the defendant to compromise the irreconcilable terms which he failed to do.

[4] Perhaps there was an oral collateral agreement between the defendant and the two persons who held themselves out to be the plaintiff's agents to waive clause 5 of the agreement but it was improbable that the plaintiff agreed to waive clause 9 which disentitled the plaintiff to annul the sale and terminate the agreement in the event of default by the defendant.

[5] Order 89 of the RHC is in *pari materia* with the English O. 113 Rules of the Supreme Court. This order does not provide a new remedy but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers. It is intended to remedy an exceptional mischief of a totally different character from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O. 14. This order applies to the defendant in this case.

[6] The agreement upon execution did not automatically confer equitable ownership as distinguished from equitable interest in the land to the defendant nor did the plaintiff hold it as bare or constructive trustee.

[7] The defendant was a trespasser or a squatter and in either case the Court could not intervene to aid a wrongdoer. The plaintiff being entitled to possession was entitled to turn them out.

[8] The Court ordered the defendant and others in occupation of the premises to vacate and hand over possession of the premises within 3 months of this order.

[Application allowed].

Cases referred to:
Cornwall v. Henson [1899] 2 Ch. 710 ***(foll)***
Ong Chat Pang & Anor. v. Valliappa Chettiar [1971] 1 MLJ 224 ***(foll)***
M & J Frozen Food Sdn. Bhd. & Anor. v. Siland Sdn. Bhd. & Anor. [1994] 2 CLJ 14 ***(foll)***
McPhail v. Persons, Names Unknown (CA) [1973] 1 Ch. 447 ***(foll)***
Browne v. Dawson [1840] 12 Ad. & El. 624 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 89
Rules of the Supreme Court, O. 113 (UK)

Other sources referred to:
Pollock on Torts, Frederick Pollock, 15th Edn. (1951), 292

For the plaintiff - Kanesan Muthusami; M/s. Chen, Leong & Co.
For the defendant - R.C. Murugeson; M/s. R.C. Murugeson

JUDGMENT

Haji Mohd Noor Bin Haji Abdullah J:

This is an application for a summary order under O. 89 Rules of the High Court 1980 (RHC 1980) for possession of land with a house on it. The order provides:

1. Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

The plaintiff is a vendor in a sale and purchase agreement dated 14 March 1991, and the defendant is a purchaser of a piece of land described as lot. No. 9 Sri Taman, Kuah, Langkawi, together with a double storey semi-detached house to be erected thereon for a purchase price of RM147,250.

The agreement provides *inter alia* the following salient relevant terms:

(1) The purchase price shall be paid progressively according to the specified schedule of payment;

(2) The vendor shall use its best endeavour to obtain a loan for the purchaser to finance the purchase provided the vendor is so informed in writing within 14 days;

(3) If the purchaser fails to pay any instalment as specified the vendor may terminate the agreement and dispose of the property;

(4) The vendor shall let the purchaser into possession if the purchaser has paid all monies due and payable under the agreement; and

(5) Service of document is deemed sufficient if it is sent by registered post at the given address.

In support of the application one Rosalind Singha Ang a director of the plaintiff stated that defendant paid RM14,725 being 10% of the purchase price and thereafter the defendant failed to pay any sum whatsoever in spite of repeated notices of demand by the plaintiff to the defendant. On 30 January 1992 the plaintiff sent a final notice demanding payment of RM80,987.50 together with accrued interest of RM2,786.65. The defendant failed to pay or respond in any other way to the demand and on 21 April 1992 the defendant annulled the sale and terminated the agreement with liberty to dispose of the property to any other party.

The deponent further stated that on or about 21 August 1992 the defendant unlawfully and without licence or consent of the plaintiff broke into the house and occupied it. She lodged a police report followed by a notice to the defendant to vacate the house but the latter ignored it.

The defendant filed various affidavits in reply (enclosures 5, 10, 20 and 21) stating that:

(1) Bank Bumiputra Malaysia Bhd. had on 18 May 1991 approved a loan of RM132,500 to the defendant to purchase the house and BBMB's solicitor had so notified the plaintiff's solicitors;

(2) BBMB's solicitors corresponded with the plaintiff's solicitors regarding documentation, disbursement of fund, and variation of the mode of payment;

(3) The plaintiff through its agents had agreed to the terms set out in BBMB's loan, particularly the condition that "the facility is to be released to the developer against certificate of fitness of occupation" and not progressively and that the defendant had no knowledge and did not agree to vary this condition;

(4) The defendant's occupation of the premises was in the circumstances in exercise of his right as purchaser and to prevent a fraud perpetrated against him;

(5) The plaintiff offered the defendant another premises in the same scheme (the premises in question was then already sold to another purchaser) for RM210,000 which is RM73,000 in excess of the previous purchase price but the defendant requested for the original price less the legal fees which he had already paid. There was no response from the plaintiff; and

(6) The defendant denied receiving all the notices of demand issued by the plaintiff, most of which were sent to his former address and if by such notice the defendant had committed a breach of the agreement the plaintiff had waived his right to terminate the agreement and is estopped from doing so.

Finding of facts

From the affidavit evidence of both plaintiff and defendant the following facts are established or are not disputed or are otherwise the finding of this Court.

(1) The defendant occupied the premises one year and five months after the date he executed the agreement and that he had paid only 10% down payment plus legal fees.

(2) The various notices of demand which were sent by AR Registered post to the defendant at "plot 18, Taman Dayana 07000 Kuah, Langkawi" which address was mentioned in the agreement constitute sufficient service of such notices. Thus the notice of demand dated 22 November 1991 - exhibited and marked "C" in Rosalind Singha Ang's affidavit dated 30 March 1993 - requesting settlement of unpaid instalment of RM80,987.50 plus interest of RM2,786.65 as at 22 December 1981, was sufficiently served on the defendant. The defendant failed to pay within 14 days or at all. Another notice of demand dated 30 January 1992 was similarly sent to the defendant with further notice that the plaintiff was "at liberty to dispose of the said property". Again the defendant failed to pay or respond.

(3) The defendant having obtained a 5 star plan housing loan from BBMB for RM136,466.54 failed to arrange with the bank to utilise the facility. He remained mute of action for over one year. The defendant is aware that the agreement provides that the schedule of payment is according to the architect's progress certificate but the loan provides that the disbursement of fund by the bank is against the certificate of fitness for occupation. The duty lies with the defendant to compromise the irreconcilable terms which he did not do so.

(4) Perhaps there was a collateral oral agreement between the defendant and the two persons who held themselves out to be the plaintiff's agents, to waive clause 5 of the agreement but I found it improbable and unlikely for the plaintiff to agree to waive clause 9 of the agreement which disentitled the plaintiff to annul the sale and terminate the agreement in the event of default by the defendant to pay the purchase price or commit other breaches.

(5) There is no evidence that Messrs. Ramli Amarjit & Co., (Raj & Co.) Advocates and Solicitors acted for the plaintiff as alleged by the defendant. I say so for the following reasons:

(a) The notice of termination [Exh. 'C'] by the plaintiff to the defendant at the given address was carbon copied to Raj & Co.. If Raj & Co. acted for the plaintiff that letter would have originated from the solicitor to the defendant and carbon copied to the plaintiff as was the practice adopted in another notice marked exhibit "D".

(b) It is observed that Jin-Nge & Co., Advocates & Solicitors acted for the plaintiff as per notice dated 30 January 1992 and marked exhibit "D" and it is unlikely that another law firm was appointed for the same housing scheme - see exhibit "C" dated 22 December 1991 issued by Raj & Co. (both notices are 38 days apart).

(c) A letter from Messrs Abdul Halim Said & Co. to Raj & Co. - exhibit "NAZ 3" - which states: "we were given to understand that you are the solicitors acting on behalf of them (meaning vendors - the inference is mine) in respect of the transfer" drew no response from the latter law firm.

(6) The defendant was kept informed of the development of the loan facility and every letter from the bank to its solicitors and its letters to Raj & Co. are carbon copied to the defendant at his given address. Yet the defendant did nothing, particularly when he was sufficiently served with the notice of non-payment of the purchase price, except to march to the premises and occupy it. On the contrary, the plaintiff was not aware nor was it extended a copy of the bank's letter to the defendant which letter approved the defendant's loan nor a copy of BBMB solicitor's letter requesting Raj & Co., to prepare the loan document nor any subsequent correspondence between the bank's solicitor and Raj & Co., (these letters are marked as exhibits "NAZ-1", "NAZ-2", "NAZ-3", "NAZ-4", "NAZ-5", "NAZ-6" and "NAZ-7".

The Law

Order 89 Rules of the High Court is in *pari materia* with the English O. 113 Rules of the Supreme Court. This order does not provide a new remedy but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers. Its machinery is designed to overcome the apparent shortcomings of the procedural law. It is intended to remedy an exceptional mischief of a totally different character from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O. 14. I am of the view that this order applies to the defendant in this case.

There is no right to self-help. The agreement upon execution does not automatically confer equitable ownership as distinguished from equitable interest in the land to the defendant nor does the plaintiff hold it as bare or constructive trustee. In *Cornwall v. Henson* [1899] 2 Ch. 710, 714 Cozens-Hardy J. said:

> It is often stated that the effect of a contract for sale of land is to make the purchaser from that moment in equity owner of the land. I think, however, that this statement is too wide...

In *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224 at 230 Gill FJ said:

> It would seem clear from what I have said so far that the plaintiff in the present case did not obtain an equitable title to the land by virtue of the sale agreement. What he

obtained was an equitable interest of a contractual nature in the land, which he could protect by a restrictive entry in the Land Register. In other words, he acquired a caveatable interest in the land.

In *M & J Frozen Food Sdn. Bhd. & Anor. v. Siland Sdn. Bhd. & Anor.* [1994] 2 CLJ 14 @ 19 Wan Yahya bin Pawan Teh SCJ said:

> Although the authorities seem to differ on the level of transaction at which the bare or constructive trusteeship would arise the rationale are unanimous on one issue i.e. such trusteeship can only arise on payment of the balance of the purchase price or on payment of the full purchase price.

The defendant having paid 10% of the purchase price failed to pay any further amount. The defendant had by tortious means got into possession of the land. The defendant cannot enter possession of the land in that manner. The defendant however may seek specific performance of the contract and obtain possession. The defendant has a right in personam against the plaintiff but not a right *in rem*.

Furthermore the defendant is not a tenant nor a tenant holding over after the termination of a tenancy; he is not a person who entered into or remained in occupation of the land with licence or consent of the plaintiff. The defendant is a trespasser or a squatter and in either case the Court can never intervene to aid such a wrongdoer.

In *McPhail v. Persons, Names Unknown* (CA) [1973] 1 Ch. 447 @ 456 Lord Denning MR said:

> What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can. He may seek to justify or excuse his conduct. He may say that he was homeless and that this house or land was standing empty, doing nothing. But this plea is of no avail in law.

In this present case the defendant paid RM14,725 of the purchase price of RM147,250 and thereafter paid nothing for one year and five months. Then he broke in and entered with strong hands and brought in his family members. This, the law forbids. He was a trespasser when he entered and he and his family members continued to be trespassers so long as they remained there. Trespassers never gain possession.

The plaintiff being entitled to possession was entitled to turn them out.

See *Browne v. Dawson* [1840] 12 Ad. & El. 624. Sir Frederick Pollock in his book **Pollock on Torts,** 15th Edn. (1951) @ 292 put it this way:

> A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner.

In the circumstances of the whole case and in the exercise of my discretion I grant an order in terms that the defendant and others in occupation of the premises do vacate and hand over possession of the premises. The appropriate order must be that the defendant and his family members vacate the premises forthwith but under peculiar circumstances I allow the defendant and his family members a grace period of 3 months to comply with this order.